STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP1699-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NAKYTA V.T. CHENTIS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Waukesha County Circuit Court, the Honorable Maria S. Lazar, Presiding, and an Order Denying Postconviction Relief, the Honorable J. Arthur Melvin, III, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was there a factual basis for the defendant's plea where the allegations used to support the plea would have been insufficient to sustain a conviction had there been a trial?

The circuit court ruled that there was a sufficient factual basis for the defendant's plea.

2. Was trial counsel ineffective for failing to seek dismissal of the charge for which there was insufficient evidence to convict Mr. Chentis?

The circuit court did not reach this issue because it concluded there was a factual basis for Mr. Chentis' prosecution and conviction.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Chentis does not seek oral argument or publication. This case can be resolved by applying settled law to an undisputed set of facts.

STATEMENT OF FACTS

Nakyta Chentis was charged with possessing a narcotic and possessing drug paraphernalia after police searched his car during a traffic stop and found a white powder in a bag, needles, a pipe, and a metal "cooking cap." (1:2.) A field test of the powder was positive for oxycodone. (1:2.)

At a pretrial hearing on December 4, 2018, Chentis' counsel asked to schedule the case for trial, explaining "I don't believe the substance has been tested by the State lab, at least I don't have any results and I don't think that the State would do that unless it gets scheduled for trial. I am requesting the substance be tested and we are taking the position that it wasn't what the State states it is." (63:2.) The prosecutor agreed that "setting it for trial could probably assist in getting this moved along." (63:3.) The case was scheduled for trial three months later in March 2019.

The crime lab had actually already tested the white powder eight months earlier, and concluded it was not a controlled substance. (33:13; App. 142.) The record does not reflect why the prosecutor did not mention this in court, or why the exculpatory result was not disclosed to the defense.

When submitting the white powder to the crime lab, the Brookfield Police Department also submitted a metal cup for testing.[1] (33:11; App. 140.) The crime lab was not able to collect a sample from the cup, so it used a "menthol rinse" to determine whether it could extract a residue of a controlled substance from the cup. (33:13; App. 142.) The menthol rinse tested positive for heroin and cocaine, but there was not a measurable quantity of either substance. (33:13; App. 142.)

[1] The metal "cooking cap" described in the complaint is interchangeably referred to as both a cup and a cap. This brief uses cup to describe the object.

At the final pretrial hearing, Mr. Chentis agreed to plead no contest to Count 1, possessing a narcotic, in exchange for the dismissal of Count 2, possessing drug paraphernalia. (64:2-3; App. 109-10.) The prosecutor also agreed to recommend probation. (64:2-3; App. 109-10.)

Neither party told the court about the crime lab result until the court sought to determine whether there was a factual basis for Mr. Chentis' plea.

> The Court: Listen carefully, Mr. Chentis. Given the fact that you've plead [sic] no contest, are there still sufficient facts alleged in the information and complaint upon which this Court could conclude that you were, in fact, guilty of possessing oxycodone on Thursday, July 20, 2017?
>
> Trial counsel: Your Honor, the reason for the—the substance that they tested is not what he ultimately would have been convicted on if the case went to trial. There's been some lab testing of some of the paraphernalia that found trace amounts of heroin, and that's the basis. So I just want to put that on the record, that that's the basis for his no contest plea today.
>
> The Court: It was a controlled substance, just not that one?
>
> Trial counsel: Correct. I understand the State could have filed an amended information or done any number

> of things, but the fact—if the case were to proceed to trial, given what we know through discovery and through the complaint, there is sufficient evidence that Mr. Chentis understands that he could have been found guilty at trial.
>
> The Court: Of possession of a controlled substance?
>
> Trial counsel: Correct.
>
> The Court: Is that your understanding as well, Mr. Chentis.
>
> Mr. Chentis: Yes.

(64:11-12; App. 118-19.) The court then accepted Mr. Chentis' plea. (64:12; App. 119.)

During his sentencing argument, trial counsel reiterated that Mr. Chentis' plea was based on the residue in the cup: "what was tested in this case and tested positive for the presence of heroin was a teacup—the metal tin that a teacup sits in, which was in Mr. Chentis' glove box that he wasn't even aware was in." (64:15; App. 122.)

The court sentenced Mr. Chentis to five months in jail, but stayed that sentence for two years of probation. (64:19; App. 126.)

Mr. Chentis filed a postconviction motion for plea withdrawal arguing: (1) the immeasurable residue would have been insufficient to sustain a conviction at trial, so it could not supply a factual

basis for his plea, and (2) his counsel was ineffective for advising him to plead no contest to a charge for which he could not be convicted at trial. (33.) Mr. Chentis' motion relied on the Wisconsin Supreme Court's decision in *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977), which held that a defendant cannot *knowingly* possess a controlled substance when the substance is present only in an immeasurably small quantity that can only be detected "by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." *Id.* at 228.

The circuit court heard arguments from the parties, but denied the motion without an evidentiary hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). (65:45; App. 103.)

The court concluded that Mr. Chentis knowingly and voluntarily entered his plea. (65:44; App. 102.) The court noted that a jury would have heard about the heroin in a cup, and had it heard the evidence, a reasonable jury could have convicted Mr. Chentis. (65:44-45; App. 102-03.)

ARGUMENT

I. There was no factual basis for Mr. Chentis' plea because the circuit court was not presented with sufficient facts to conclude that he *knowingly* possessed a controlled substance.

Mr. Chentis is entitled to plea withdrawal because the record fails to establish that he knowingly possessed a narcotic. Mr. Chentis pleaded no contest to possessing a quantity of heroin so small that even the crime lab could not measure it. The Wisconsin Supreme Court has held that a conviction based on possession of such an unidentifiable quantity cannot stand. *Kabat v. State*, 76 Wis. 2d 224, 251 N.W.2d 38 (1977). Therefore, there was no factual basis for Mr. Chentis' plea, and he is entitled to plea withdrawal.

A. A defendant is entitled to plea withdrawal if the circuit court fails to establish a factual basis for the plea.

When a defendant pleads guilty or no contest the court must "make such inquiry as satisfies it that the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b); *McCarthy v. United States*, 394 U.S. 459, 467 (1969); *White v. State*, 85 Wis. 2d 485, 488, 271 N.W.2d 97 (1978). In other words, the court must find in its review of the record that there is a factual basis for the crime and that the defendant is knowingly admitting to those facts. *McCarthy*, 394 U.S. at 466-67.

The circuit court must make this inquiry to protect "a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *White*, 85 Wis. 2d at 491. Thus, the court is not merely a rubber stamp for the parties' plea agreement. Instead, the court must play an active role in ensuring the defendant is actually guilty of the charged offense. Moreover, the court must not accept the plea when it becomes apparent that the defendant is not guilty of the charged offense. *See id.*

A defendant is entitled to plea withdrawal upon showing that "a refusal to allow withdrawal of the plea would result in a manifest injustice." *State v. Brown*, 2006 WI 100, ¶ 18, 293 Wis. 2d 594, 716 N.W.2d 906. "[I]f a circuit court fails to establish a factual basis that the defendant admits constitutes the offense pleaded to, manifest injustice has occurred," and the defendant can withdraw the plea. *State v. Thomas*, 2000 WI 13, ¶ 17, 232 Wis. 2d 714, 605 N.W.2d 836.

Where the factual basis is determined through non-testimonial evidence, as occurred here, the appellate court decides independently whether a factual basis exists. *State v. Peralta*, 2011 WI App 81, ¶ 16, 334 Wis. 2d 159, 800 N.W.2d 512.

B. Mr. Chentis is entitled to plea withdrawal because the record does not establish that he knowingly possessed a narcotic.

Mr. Chentis is entitled to plea withdrawal because the facts presented to the court were insufficient to show that he knowingly possessed a narcotic. Mr. Chentis pleaded no contest to possessing "trace amounts of heroin" discovered in a metal cup after the crime lab revealed that the white powder that originally supported the charge was not a controlled substance. (64:11-12; App. 118-19.) However, the State would have been unable to secure a conviction based on his possession of this immeasurably small residue, so there was no basis for the court to accept Mr. Chentis' plea.

1. *Knowing* possession of a narcotic cannot be presumed when dealing with immeasurably small quantities of the substance.

This case is controlled by the Wisconsin Supreme Court's decision in *Kabat v. State*, which held that a defendant cannot *knowingly* possess an immeasurable residue of a controlled substance. There, the defendant was prosecuted for possessing marijuana after the ash in a pipe he possessed was found to contain the active ingredients for marijuana. 76 Wis. 2d 227-28. The defendant conceded that he possessed the marijuana, but argued no jury could reasonably find that he did so knowingly. *Id.* at 227.

The Wisconsin Supreme Court agreed, holding that "the presence of the narcotic must be reflected in

such form as reasonably imputes knowledge to the defendant." *Id.* at 228 (internal quotations and emphasis omitted). The court explained, "Guilt or innocence on a charge of illegally possession may not be determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." *Id.* The court held that the small quantity of marijuana in the pipe's ashes could not be "sufficient to sustain a conviction of knowing possession of a narcotic." *Id.* at 229.

Just as in *Kabat*, this case involves an immeasurably small quantity of a narcotic. The substance in this case was only detectable by use of a "menthol rinse" to extract it from the metal container. (33:13; App. 142.) Even the crime lab was unable to identify a specific quantity of the substance. (33:13; App. 142.) Mr. Chentis' conviction was impossible for the same reason the conviction was overturned in *Kabat*; his guilt could not rest on the crime lab's skill at isolating an unobservable substance from a metal surface that happened to contain a controlled substance.

This case is easily distinguished from *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), a case where a defendant unsuccessfully sought to have her conviction overturned under *Kabat*. There, police searched the defendant's purse during a traffic stop. *Id.* at 498. Inside, they found a glass vial and a compact with two mirrors that "appeared to have been recently licked or wiped off wet, leaving a powdery residue." *Id.* A crime analyst found cocaine in the threads of the vial used to hold the cap. *Id.* At

the ensuing trial, the defendant admitted that the vial previously contained cocaine, which she used with her boyfriend. *Id.* at 498-99.

On appeal, the defendant argued her conviction was void under *Kabat* because she was found with such a small quantity of cocaine. The Wisconsin Supreme Court disagreed, pointing out two reasonable theories that could have led to her conviction. First, the jury could reasonably conclude that she looked at the vial when replacing the cap—as many people do when putting caps on containers—and she would have been aware of the remaining cocaine. *Id.* at 508-09. Second, "[o]n the basis of [the common knowledge that a substance will often remain in a container unless vigorously cleaned], *together with the defendant's admission that she knew that the vial contained cocaine at one time*, the jury could reasonably infer that the defendant knew that the vial contained residual amounts of cocaine at the time of her arrest." *Id.* at 509 (emphasis added). Thus, in the absence of an easily observable quantity of the drug, her confession was necessary for the conviction.

In contrast, Mr. Chentis' conviction could not be sustained under either theory from *Poellinger*. First, unlike *Poellinger*, this case does not involve a distinct quantity of drugs that could be observed, collected, and tested. The record before the trial court contained no allegation that a residue could be seen on the metal cup, as it was seen on the vial threads or the compact from *Poellinger*. Second, the complaint did not include any allegation that Mr. Chentis admitted to knowingly possessing the narcotic like

the defendant from *Poellinger* did. Rather, his attorney insisted at sentencing that Mr. Chentis did not even know about the metal cup in his car. If Mr. Chentis told police that he possessed the cup and used it when possessing heroin, there may have been a basis to accept his plea. But without a confession to knowing possession, this case is governed by *Kabat*, holding that such a minuscule quantity of a drug cannot be used to impute knowing possession.

2. Once the circuit court heard that Mr. Chentis was pleading guilty to possessing "trace amounts" of heroin, it was required to make a further inquiry to satisfy *Kabat*.

The circuit court needed to conduct a further inquiry into the factual basis for Mr. Chentis' conviction after his counsel said he was pleading to possessing "trace amounts" of heroin. (64:11; App. 118.) The circuit court is presumed to know the law, so it must be presumed that the court knew the rule from *Kabat*. *See Tri-State Mech., Inc. v. Northland Coll.*, 2004 WI 100, ¶ 10, 273 Wis. 2d 471, 681 N.W.2d 302. The circuit court, having heard that Mr. Chentis was pleading guilty to possessing "trace amounts" of heroin should have engaged in a further inquiry to establish whether there was enough evidence to impute knowing possession of heroin to Mr. Chentis.

The court could not simply rely on caselaw holding that a defendant may knowingly possess a modicum or unusable quantity of a drug. *State v. Dodd*, 28 Wis. 2d 643, 651, 137 N.W.2d 465 (1965).

Kabat requires that when dealing with microscopic quantities of a controlled substance, there must be more than just the presence of the substance to impute knowing possession. The mere fact of the drug's presence is not enough.

"On a motion to withdraw, a court may look at the totality of the circumstances to determine whether a defendant has accepted the factual basis presented underlying the guilty plea." *State v. Thomas*, 2000 WI 13, ¶ 23, 232 Wis. 2d 714, 605 N.W.2d 836. But the record in this case says almost nothing about the circumstances of Mr. Chentis' possession because the parties "amended" the facts underlying the charge without informing the court until it began asking Mr. Chentis about oxycodone. The criminal complaint does not indicate that there was an observable residue in the metal cup. The only statement of the factual basis came from Mr. Chentis' trial counsel, who stated that Mr. Chentis was admitting to possessing "trace amounts" of heroin. But as discussed previously, possessing a "trace amount" of a substance does not necessarily support a conviction. In light of *Kabat*, the circuit court needed to inquire further to ensure that Mr. Chentis' conviction was proper. And as discussed above, in light of the evidence that he possessed an immeasurable and seemingly unobservable quantity of heroin, had the court made that further inquiry, it would have had no basis to accept Mr. Chentis' plea. Therefore, this court should reverse and allow Mr. Chentis to withdraw his plea.

II. This court should remand for a *Machner* hearing to determine whether trial counsel had a strategic reason for failing to seek dismissal to a charge where there was no basis for a conviction.

The evidence provided to the circuit court was insufficient to establish a factual basis for Mr. Chentis' plea, but the crime lab report further shows that there was no basis for Mr. Chentis to be charged for possessing a controlled substance. After the white powdery substance that formed the basis for the criminal complaint tested negative, counsel should have sought dismissal of the charge against Mr. Chentis. His failure to do so constitutes ineffective assistance of counsel.

A. Relevant law.

The "manifest injustice" test for plea withdrawal "is met if the defendant was denied the effective assistance of counsel." *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). When a plea withdrawal motion and an ineffective assistance of counsel motion are intertwined, the defendant must allege a prima facie case of ineffective assistance of counsel. *State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis.2 d 151, 772 N.W.2d 232. The defendant must allege that defense counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To establish deficient performance, the defendant must show "facts from which a court could conclude that counsel's representation was below the

objective standard of reasonableness." *Wesley*, 2009 WI App 118, ¶ 23. "To establish prejudice, the defendant must show facts from which a court could conclude that its confidence in a fair result is undermined." *Id.* In plea withdrawal cases, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

"[T]o be effective, counsel must act in a manner that demonstrates that he is versed in the criminal law." *State v. Felton*, 110 Wis. 2d 485, 505-06, 329 N.W.2d 161 (1983). Counsel's failure to be aware of an applicable defense is "a glaring deficiency in trial counsel's knowledge of the law." *Id.* "The lawyer's duty to inform himself on the law is equally and often more important [than investigating the facts of the case]; although the client may sometimes be capable of assisting in the fact investigation, he is not educated or familiar with controlling law." *Id.* at 506 (emphasis omitted).

The circuit court denied Mr. Chentis' claim that counsel provided ineffective assistance without a hearing. However, if a postconviction motion alleges material facts that, if true, would entitled the defendant to relief, the circuit court *must* hold an evidentiary hearing." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added). Even if the allegations in the motion "seem to be questionable in their believability," the court must assume the facts as true. *Id.*, ¶ 12 n.6. Whether the motion alleged facts sufficient to warrant relief is a

question of law, which this court reviews de novo. *Id.*, ¶ 12.

B. Trial counsel was ineffective for counseling Mr. Chentis into pleading to a charge that should have been dismissed for lack of evidence.

Here, counsel performed deficiently by failing to seek dismissal of the felony narcotic charge after receiving the exculpatory crime lab report. Counsel's failure to seek dismissal suggested that he was unfamiliar with *Kabat* and its applicability to this case. Constitutionally effective counsel would have sought dismissal of the felony charge because the crime lab report was completely exonerating. The white powder which formed the basis for the felony charge was not a controlled substance. And the only controlled substance—an unobservable amount of heroin in a metal cup—was so miniscule that its presence was "determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant." *Kabat*, 76 Wis. 2d at 228.

Instead of seeking dismissal of the charged narcotics offense, counsel compounded his ineffectiveness by counseling Mr. Chentis to plead no contest to the residue in the metal cup. But, as argued above, that residue was insufficient as a matter of law to sustain Mr. Chentis' conviction. Counsel performed deficiently by failing to seek dismissal of a charge and instead counseling his client to plead no contest to a charge with no factual basis.

Mr. Chentis was prejudiced by counsel's deficiency because there was a reasonable probability he would not have pleaded no contest to the felony count had his counsel properly had it dismissed. Mr. Chentis' postconviction motion alleged that he would testify that his attorney did not offer to seek dismissal of the felony charge after receiving the crime lab report. The motion further alleged that Mr. Chentis would not have pleaded guilty had his counsel successfully had the charge dismissed.

The circuit court found there was a factual basis for Mr. Chentis' plea, so it declined to hold a *Machner* hearing on this issue.[2] Although there could be no reasonable strategic basis for counsel to fail to seek dismissal of a meritless charge, this court should reverse for an evidentiary hearing to take testimony from trial counsel and determine whether the charge against Mr. Chentis must be dismissed for a lack of evidence.

[2] Mr. Chentis conceded that he could not prevail on his claim of ineffectiveness if the court concluded a factual basis existed to accept his no contest plea. Trial counsel could not be ineffective for failing to seek dismissal of a charge with a proper factual basis.

CONCLUSION

For the reasons argued above, Mr. Chentis asks that the court reverse the decision of the circuit court denying his postconviction motion, and remand with instructions that Mr. Chentis be permitted to withdraw his plea. Mr. Chentis further asks that the case be remanded for further proceedings to determine whether the charge must be dismissed under *Kabat*.

Dated this 22nd day of December, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,627 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 22nd day of December, 2020.

Signed:

Electronically signed by Dustin C. Haskell
DUSTIN C. HASKELL
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